KIRITIVAASAN UDAYA SOORIAN A

v.

PP

HIGH COURT MALAYA, IPOH B
NOORIN BADARUDDIN JC
[CRIMINAL APPEAL NOS: 42H-14-11-2013
& 42S-20-11-2013]
29 SEPTEMBER 2014

C

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Accused person convicted for voluntarily causing hurt in committing robbery - Penal Code, ss. 34, 394 - Sentenced to seven years imprisonment and two strokes of whipping - Whether witnesses credible and reliable - Whether accused person's defence of alibi probable* D

CRIMINAL PROCEDURE: *Sentencing - Appeal by prosecution against sentence imposed by Sessions Court - Accused person convicted for voluntarily causing hurt in committing robbery - Penal Code, ss. 34, 394 - Sentenced to seven years imprisonment and two strokes of whipping - Whether sentence adequate* E

EVIDENCE: *Identification evidence - Quality of - Accused person entered complainant's house to commit robbery and voluntarily caused hurt to complainant in the process - Complainant managed to pull accused person's mask to reveal identity - Accused person had distinctive feature of deformed index finger - Whether identification parade held regular - Whether complainant could identify accused person positively - Whether identification of good quality* F

Two men wearing black masks had entered the house of the complainant ('SP8') and one of them hacked him on the head while the other placed a parang on his mother's ('SP9') neck. During a scuffle, SP8 managed to pull the black mask worn by his assailant and identified him to be the appellant. SP8 also spotted his assailant's deformed index finger. Both the assailants fled the scene with SP9's necklace but the appellant was eventually arrested while the other assailant was still at large. The appellant was convicted by the Sessions Court for voluntarily causing hurt in committing robbery, an offence under s. 394 read together with s. 34 of the Penal Code and was sentenced to seven years imprisonment and two strokes of whipping. Hence, the appeal. G H I

A The issues raised by the appellant were (i) the credibility and reliability of SP8 and SP9 as it was argued that SP8 had agreed to the suggestion in cross-examination that he lied when he said he knew his assailant; (ii) there was no one else in the identification parade who had a deformed finger and there was a B disparity of height between the appellant and the other participants; and (iii) whether the appellant's alibi that he was in Johor Bahru for two to three months during the incident was probable. The prosecution on the other hand appealed against the sentence, arguing that it was inadequate.

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Held (dismissing appeal; affirming conviction and sentence of Sessions Court):

(1) The question by the appellant's counsel and the answer given by the appellant were towards the end of the cross- D examination. The court should not be confined to look at this particular piece of evidence alone and in isolation because the rest of SP8's evidence showed that he had repeatedly said he knew that the appellant was his assailant and that he saw the appellant's deformed index finger. A misspoken answer to a E question designed to ambush the witness should not render past answers unreliable and unacceptable. (para 17)

(2) The material aspect in this case was whether SP8 could identify the appellant positively. Any other discrepancies which F did not affect the root or element of the offence could not be said to have destroyed the prosecution's case. The identification parade conducted was in accordance with the prescribed procedures. Even without the identification parade, SP8 could identify the appellant positively as the incident was G not the first when he saw the appellant. Nevertheless, since the identification parade was held and again, SP8 had identified the appellant, it strengthened the prosecution's case that it was the appellant who had robbed SP9 and caused hurt to SP8. (paras 25, 27 & 28)

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(3) The identification of the appellant by SP8 was of good quality due to the fact that SP8 knew and recognised the appellant before the incident. There was a scuffle between SP8 and the appellant that resulted in SP8 successfully pulling off the mask I worn by the appellant. This fact combined with the fact that the appellant was not a stranger to SP8 gave the effect of the identification evidence being more reliable and more weight

could be placed on such evidence. The quality of the identification of the appellant was further strengthened by the unique feature of the appellant's deformed index finger. (paras 20, 22 & 23)

(4) The appellant's alibi defence failed to raise a reasonable doubt on the prosecution's case as there were discrepancies and the alibi was unreliable in nature. There was a glaring doubt as to the real address of the company where the appellant was said to be at the time of incident. (paras 36, 37 & 38)

(5) There were no compelling reasons to disturb the SCJ's findings on the sentence. Even though the sentence imposed seemed to be inadequate, it could not be said to be manifestly inadequate. (para 42)

Case(s) referred to:
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Datuk Haji Harun Haji Idris (No 2) [1976] 1 LNS 184 ***(refd)***
R v. Turnbull [1977] QB 224 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, ss. 34, 394

For the prosecution - Harris Ong, DPP
For the appellant - Haijan Omar; M/s Gobind Singh Deo & Co

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin JC:

[1] This is an appeal by the appellant in Criminal Appeal No: 42S-20-11/2013. The appellant appealed against his conviction for the offence of voluntarily causing hurt in committing robbery with one other person still at large under s. 394 of the Penal Code

read together with s. 34 of the same Code. The Public Prosecutor in Criminal Appeal No: 42H-14-11/2013 appealed against the sentence passed by the learned Sessions Judge. The appellant was sentenced to seven years imprisonment and two strokes of whipping.

[2] The charge against the appellant reads as follows:

> Bahawa kamu secara bersama seorang lagi yang masih bebas, pada 11.5.2012, antara jam lebih kurang 2.30 petang hingga 2.45 petang, di rumah No. 194, Taman Desa Bakti, 36000 Teluk Intan, di dalam daerah Hilir Perak, di Negeri Perak, telah melakukan rompakan ke atas harta alih milikan LALITHA A/P SUBRAMANIAM, kpt: 690912-08-5168, iaitu (1) utas rantai leher emas, dan semasa melakukan rompak dengan sengaja menyebabkan cedera terhadap ASOK KUMAR A/L SUBRAMANIAM, kpt: 910928-08-6423. Oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Sekseyn 394 Kanun Kesiksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] The prosecution called a total of nine witnesses to prove their case.

Case For The Prosecution

[4] On 11 May 2012 at around 2.45pm, the victim ie, SP8 was watching television at his mother's (SP9) house. His mother, SP9 had just returned home after fetching SP8's sister at school and had entered the house without closing the house gate.

[5] While SP9 was checking her daughter's homework, she saw two men entered the area of the house and SP9 started screaming.

[6] Upon hearing his mother screaming, SP8 who was lying down watching television got up and soon after, was hacked on the head by one of the two men ('assailants') who entered the house. The other assailant had put a 'parang'/machete at the neck of SP9. SP8 tried to stop his assailant and during the scuffle, he saw the deformed index finger of his assailant. SP8 succeeded in pulling off the black mask worn by his assailant. He saw and identified his assailant to be the appellant.

[7] The scuffle also happened between SP8 and the other assailant in the kitchen when SP8 was trying to rescue his mother SP9. SP8's younger brother came out from a room and was

about to be attacked when SP8 again came to the rescue. SP8 suffered another injury in the kitchen in his attempt to stop the assailant from using the 'parang'/machete on his younger brother.

[8] Both the assailants had forced SP9 to surrender her necklace and fled the house through the front door. Both the assailants locked SP8 and his family from outside the house and on their way out from the house they managed to hack the dog belonging to SP8's family. Their neighbour, SP6 helped to open the door for SP8 and his family.

[9] SP8 was taken to the hospital and was treated for the injuries he suffered. P5 is the medical report for SP8. SP8 suffered multiple laceration wound over his head, right shoulder, right forearm and right palm. He also suffered skull fracture at temporal region with pneumocranium and traumatic SAH. SP9 was also given treatment and she had lodged a police report D10 thereafter.

[10] Eventually, the appellant was arrested and charged together with the other assailant who are still at large.

[11] The central issues raised by counsel for the appellant were the identification of the appellant by SP8 and SP9 as well as the defence of alibi.

[12] It was contended by the appellant's counsel, that there was no specific finding made by the learned Sessions Judge in respect of the credibility and reliability of SP8 and his mother SP9. The learned Sessions Judge was said to have failed to allude to the cross-examination of SP8. At pp. 81 and 82 of the appeal record towards the end of the cross-examination, there were suggestions by learned defence counsel to SP8 that SP8 did not inform his mother about his assailant and that SP8 had lied about him knowing who the assailant was. The excerpts of the cross-examinations at pp. 81 and 82 are as follows:

> Cadang: Kamu tidak beritahu kepada emak kamu mengenai penyerang
>
> Saya ada bercerita kepada emak saya
>
> Saya juga telah beritahu emak saya yang saya tidak tahu tentang penyerang tersebut
>
> Cadang: kamu cakap bohong. Kamu tidak kenal penyerang sebenarnya

A Saya setuju

Emak saya ada membuat laporan kejadian yang berlaku

Cadang: Penyerang yang menyerang kamu bukanlah OKT di dalam kes ini?

B Saya tidak setuju

Cadang: Ada pergi kawad cam?

Ya.

C Kawad cam ada dijalankan.

[13] There was no re-examination by the DPP on the above contradictions or discrepancies by SP8. The earlier part of SP8's testimonies revealed that SP8 knew the assailant.

D **[14]** Learned counsel further challenged the identification of the deformed index finger of the appellant by SP8. Learned counsel contended that for an incident that occurred in 20 minutes (according to SP8) it would have been impossible for SP8 to have E noticed the said deformed finger. The excerpts of evidence in cross-examination of SP8 pertaining to this matter can be found at pp. 80 and 81 of the appeal record:

Penyerang pun melarikan diri, tetak anjing dan terus menaiki motosikal meninggalkan rumah kami.

F Saya tidak setuju yang saya tidak tarik topeng penyerang pada tarikh kejadian.

Penyerang tidak tunjukkan tangan mereka kerana mereka masing-masing memegang parang

G Cadang: Penyerang sentiasa pegang parang tidak dilepaskan setuju?

Saya setuju.

Cadang: Penyerang pegang parang dengan erat?

H Saya setuju

Cadang: Kamu tidak nampak tangan penyerang yang memegang parang.

I Saya tidak setuju. Saya ada melihat apabila mereka memegang parang

Cadang: Mustahil kamu dapat lihat jari penyerang ketika mereka menyerang parang setuju? A

Saya tidak setuju.

Cadang: Hanya bahagian atas jari sahaja yang kamu dapat lihat, setuju? B

Saya tidak setuju. Saya dapat lihat jari penyerang.

[15] Where identification is concerned, it is a question of fact. Where question of fact is involved this court is always reminded that an appellate court will generally not disturb a trial judge's findings of fact unless they are closely reached against the weight of the evidence. In examining the evidence, an appellate court has always to bear in mind that it has neither seen nor heard the witnesses and has to pay due regard to the trial judge's findings and their reasons therefor. C D

[16] This court found that the case against the appellant depends wholly or substantially on the correctness of the identification evidence. The case of *R v. Turnbull* [1977] QB 224, [1976] 3 All ER 549 laid down the guidelines for judges to ask when encountering a criminal case where there is identification evidence. Question is, is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made. The list to determine is non-exhaustive but a few which are applicable include the length of time that the witness observed the accused, the distance at which the observation was made, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused and the subsequent identification to the police and the presence of material discrepancies if any: *R v. Turnbull (supra)*. E F G

[17] The identification of the appellant by SP8 was scrutinised by this court. This court found from the entire evidence of SP8, the identification was of good quality. This court noted the issues raised by learned counsel for the appellant that during cross-examination he agreed to the suggestion put by learned counsel that he was telling lies that he knew his assailant and that he did inform his mother SP9 that he did not know his assailant. It is pertinent to note that the question by learned counsel and the answer given by the appellant were towards the end of the cross- H I

examination by the defence counsel. The court should not be confined to look at this particular piece of evidence alone and in isolation because the rest of the evidence of SP8 showed that he repeatedly said he knew that the appellant was the assailant and that he saw the deformed index finger of the appellant. This court agreed with the submission of learned DPP that a misspoken answer to a question designed to ambush the witness should not render past answers unreliable and unacceptable.

[18] In the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705, Augustine Paul J stated:

> Mere suggestions by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either partly or wholly accepted of the witness for the prosecution.

[19] This court found that the failure on the part of the prosecution to clarify during re-examination as to this particular part of evidence from SP8 as well as the failure of the learned Sessions Judge to allude to this contradictions did not render the whole of SP8's evidence unacceptable.

[20] This court is further justified that the identification of the appellant by SP8 was of good quality due to the fact that SP8 knew and recognised the appellant before the incident. At p. 68 of the appeal record SP8 said these during examination-in-chief:

> Saya ada menghalang orang yang menyerang saya pada ketika itu, saya nampak orang tersebut kudung jari telunjuk.
>
> Semasa beliau pegang parang, saya nampak jarinya kudung. Parang dipegang dengan tangan kanan
>
> Bahagian hujung jari kudung
>
> Semasa saya menghalang saya berjaya buka topeng orang yang menyerang saya tersebut dan nampak mukanya.
>
> Topeng hitam kain yang nampak mata sahaja dipakai oleh orang yang menyerang saya itu.
>
> Topeng tersebut menutup sehingga paras rupa yang berwarna hitam.
>
> Orang yang menyerang saya juga memakai helmet yang visor di depan.
>
> Saya telah tarik di bahagian dagu dan ianya tertanggal.

Penyerang buka helmet dan mukanya ditutup dengan topeng. A

Topeng di bahagian dalam. Topi keledar bervisor sehingga di bahagian hidungnya.

Saya kenal orang yang menyerang saya namanya Kiritivasan

Kenal semasa sekolah B

Beliau di mahkamah hari ini.

(SP8 camkan OKT)

[21] In the case of *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232, it was held that it is important to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to the witness would be more reliable than identification by a witness of a stranger. C D

[22] It must be borne in mind as well that there was a scuffle between SP8 and the appellant that resulted SP8 to succeed in pulling off the mask worn by the appellant earlier. This fact combined with the fact that the appellant was not a stranger to SP8 gave the effect of the identification evidence being more reliable and more weight could be placed on such evidence. E

[23] This court is further compounded by the fact that there was a unique feature of the appellant ie, the deformed index finger which strengthened the quality of identification of the appellant. F

[24] Learned counsel for the appellant further questioned the identification parade conducted. It was contended by the learned defence counsel that there was no one else in the identification parade who had a deformed finger. The said counsel also contended that the other participants were shorter than the appellant who stood at 180cm tall while the rests were at about 170cm in height. The value of SP9's identification parade was also challenged by learned counsel as SP9 was first shown the photo of the appellant by her son SP8, before the identification parade was conducted. G H

[25] This court is of the view that the material aspect in this case was whether SP8 could identify the appellant positively. Therefore any other discrepancies which do not affect the root or element of the offence cannot be said to have destroy the prosecution's case. I

[26] Discrepancies there will always be. That was what the court stated in the case of *PP v. Datuk Haji Harun Haji Idris (No 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15 at p. 19. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. In the case of *Mohamed Alias v. PP* [1981] 1 LNS 200; [1983] 2 MLJ 172 the court had stated that the fact there are discrepancies in a witness's testimony does not straight away make him an unreliable witness and make the whole of his evidence unacceptable.

[27] This court found that the identification parade conducted was in accordance with the prescribed procedures. The learned Deputy Public Prosecutor had forwarded the case of *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 where the Federal Court stated:

> Generally speaking, however, a dock identification in the sense as described above ie, identification of an accused for the first time in Court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

[28] Even without the identification parade, SP8 could identify the appellant positively as the incident was not the first time when he saw the appellant. Nevertheless, since the identification parade was held and again SP8 had identified the appellant, it had strengthened the case for the prosecution that it was the appellant who had robbed SP9 and had caused hurt on SP8.

[29] This court is also of the view, there is nothing in the evidence produced that shows or suggestions that indicate SP8 had any malicious intention against the appellant which made him specifically identified the appellant as the assailant. It was overwhelmingly proven, that SP8 could recognised and identified the appellant during the fateful and unfortunate event where he and his family were robbed and attacked. The cumulative effect of the evidence adduced by the prosecution can only lead to the conclusion that the appellant was the person who committed the offence he was charged with.

[30] The trial judge did not err when she placed substantial weight on the identification evidence by SP8. As she had dealt with the evidence of both the prosecution as well as the defence, the learned trial judge had the audio visual privilege to assess the credibility of the witnesses which this court is deprived of. This court could not find any cogent reasons to interfere with the findings of the learned trial judge.

[31] Therefore, this court found that the learned Sessions Judge did not err in coming to the conclusion that there was a *prima facie* case for the appellant to answer.

[32] The next issue raised by learned counsel was the defence of alibi put forward by the appellant in this case. It was contended that the learned Sessions Judge had erred when she found the prosecution has made out a *prima facie* case when there was a failure on the part of the investigating officer to investigate and negative the alibi defence put forward by the appellant.

[33] The investigating officer, SP7 in cross-examination stated that the alibi notice she received from the appellant was doubtful. According to SP7, the appellant was said to be in Johore for two to three months during the incident and he was on the run from the police. But at the same time the appellant's father stated that the appellant was working with his company. In the alibi notice, the appellant stated that he was in Teluk Intan while in the appellant's statement, he could not remember.

[34] In his defence, the appellant testified that in 2012 he was working as a cleaner and a lorry painter at his own company, Sri Kiriti Enterprise. The appellant produced D11, a search result of the company from the Suruhanjaya Syarikat Malaysia.

[35] The appellant further said that on the date of incident, he was working in Batu 8, Teluk Intan from 8am to 6pm. He went out once to buy food for his workers at about 1.30pm. He stated that he came back with the food and ate with his workers before he resumed working. In short, the appellant denied he was at SP8's house and had committed the offence.

[36] The appellant's father, SD2 and SD3 a worker at the appellant's company, corroborated the testimony of the appellant. The learned Sessions Judge had evaluated the defence versions which rests entirely on the defence of alibi. The Sessions Judge

laid down her reasons in finding that the defence failed to raise a reasonable doubt on the prosecution's case at p. 18 of the appeal record as follows:

Alasan-alasan bagi dapatan Mahkamah ini adalah seperti berikut:

i. Keterangan Perayu/OKT berkaitan pembelaan alibinya adalah meragukan. Jika diteliti kepada notis alibinya yang bertarikh 4 Februari 2012 dinyatakan bahawa pada tarikh kejadian beliau berada dan sedang bekerja di Sri Kiriti Enterprise di Lot PT 1511-D, Batu 8 ½, Jalan Hutan Melintang, Perak. Begitu juga dalam keterangannya di Mahkamah di mana Perayu/OKT menyatakan perkara yang sama. Walau bagaimanapun, jika dirujuk kepada eksibit D11 iaitu carian (Suruhanjaya Syarikat Malaysia) ke atas syarikat Perayu/OKT, tiada alamat perniagaan syarikat ini seperti yang dimaklumkan oleh pihak Perayu/OKT di dalam keterangan dan notis alibinya dan hanya terdapat alamat kediaman Perayu/OKT sahaja iaitu No. 7, Taman Jelita, Batu 3 ½, Jalan Maharaja Lela, 36000 Teluk Intan, Perak.

Justeru Mahkamah berpendapat eksibit D11 ini sendiri adalah tidak lengkap untuk tunjukkan bahawa Perayu/OKT adalah sebenarnya pemilik Syarikat Kiriti Enterprise di mana Perayu/OKT juga menyatakan dalam pembelaan alibinya bahawa pada tarikh kejadian beliau sedang bekerja di syarikat tersebut. Selain daripada eksibit D11 ini, tiada juga sebarang dokumen lain dikemukakan bagi menunjukkan alamat sebenar syarikat milik Perayu/OKT ini.

ii. Begitu juga keterangan SD2 yang merupakan bapa Perayu/OKT dan SD3 yang merupakan pekerja di syarikat Perayu di mana Mahkamah berpendapat keterangan mereka tidak dapat membantu menguatkan pembelaan alibi yang dikemukakan oleh Perayu/OKT di dalam kes ini. Malah, terdapat keterangan SD2 yang menimbulkan rasa curiga Mahkamah kepada Syarikat Perayu/OKT tersebut. Keterangan tersebut adalah berkaitan syarikat tersebut dikatakan tiada rekod kedatangan pekerja-pekerja pada setiap hari. Tanpa rekod-rekod ini timbul pertanyaan samada SD2 dan SD3 adalah sebenarnya pekerja-pekerja di syarikat Perayu/OKT tersebut? Jika terdapat persoalan sebegini, adakah keterangan mereka ini boleh diterima untuk menyokong pembelaan alibi Perayu/OKT di dalam kes ini? Jawapan pada persoalan ini pada pandangan Mahkamah adalah tidak.

iii. Manakala keterangan SD3 pula terdapat keraguan apabila beliau menyatakan telah bekerja degnan syarikat Perayu/OKT sejak 5 tahun yang lalu. Ini adalah kerana eksibit D11 jika dirujuk menunjukkan syarikat Perayu/OKT mula beroperasi pada tahun 2010 iaitu lebih kurang 3 tahun yang lalu dan begitu juga seperti yang dinyatakan oleh Perayu/OKT dan SD2 dalam keterangan mereka. Persoalan daripada keterangan SD3 ini adalah samada beliau adalah sebenarnya bekerja dengan Perayu/OKT semasa kejadian ataupun merupakan bekas pekerja Perayu/OKT pada tempoh masa yang tidak berkaitan dengan kejadian yang berlaku. Dengan persoalan ini Mahkamah juga berpendapat keterangan SD3 tidak dapat membantu pembelaan alibi yang dikemukakan oleh Perayu/OKT di dalam kes ini.

iv. Dengan keterangan pembelaan alibi Perayu/OKT ini juga meragukan, Mahkamah berpendapat pembelaan ini telah gagal untuk menimbulkan keraguan terhadap kes pihak pendakwaan di mana keterangan SP8 terutamanya yang memang kenal Perayu/OKT sebelum kejadian sehingga ke peringkat mengetahui keadaan jari Perayu/OKT yang kudung jelas tidak tergugat dengan keterangan pembelaan Perayu/OKT ini.

Rujuk kes *PP lwn. Arumugam Shanmugam* [2013] 1 LNS 57, YA Hakim telah menyatakan bahawa

> pembelaan alibi wajar dinilai secara berhati-hati kerana pembelaan ini mudah dibuat tetapi tidak mudah untuk dibuktikan.

Di dalam kes ini Mahkamah telah pun menilai pembelaan alibi oleh Perayu/OKT secara berhati-hati dan mendapati ianya gagal untuk menimbulkan sebarang keraguan terhadap kes pihak pendakwaan.

Dalam menilai dan memutuskan samada keterangan pembelaan OKT ini boleh diterima dan berjaya menimbulkan keraguan terhadap kes pendakwaan atau sebaliknya, Mahkamah telah memakai garis panduan di dalam kes *Mat lwn. PP* [1963] MLJ 263 yang menyatakan antara lain seperti berikut: (dengan izin)

> If the Court do not accept or believe the accused's explanation ... do not convict but consider ... if that explanation does not raise in your mind a reasonable doubt as to the accused's guilt ... convict.

A Maka di dalam kes ini daripada keterangan pembelaan Perayu/ OKT dan keseluruhan kes, Mahkamah tidak dapat menerima pembelaan yang dikemukakan oleh OKT dan juga mendapati pembelaan Perayu/OKT tersebut gagal untuk menimbulkan sebarang keraguan yang munasabah, terhadap kes pendakwaan. Justeru, Mahkamah mendapati Perayu/OKT bersalah dan disabitkan sepertimana pertuduhan.

[37] The learned Sessions Judge could not be faulted when she found the discrepancies and the unreliable nature of the appellant's alibi.

[38] After scrutinising the whole of the defence forwarded by the appellant, this court agreed with the evaluation and the findings of the learned Sessions Judge. The search on the appellant's company compared with the testimony of the appellant, SD2 and SD3 were questionable. There was a glaring doubt as to the real address of the company where the appellant was said to be at the time of incident. The discrepancies and unreliable nature of the appellant's alibi failed to cast any reasonable doubt on the prosecution's case. As the Federal Court stated in the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49 at para. [82] of the case:

> [82] ... alibi could not prevail over the positive identification of an accused person especially so in the face of categorical statements coming from credible witnesses who had no ill motives in testifying.

[39] The appellant in his petition of appeal further stated that the learned Sessions Judge had erred in not making a finding whether the element of s. 34 of the Penal Code was proven.

[40] It was obvious from the evidence of SP8 and SP9, they were attacked by two assailants on the day of the incident. Both the assailants took the gold necklace belonging to SP9 and had injured SP8. Both the assailants then locked SP8, SP9 and their family from outside the house. With these evidence not being challenged (except for identification), the absence of finding by the learned Sessions Judge on s. 34 of the Penal Code is devoid of merit.

[41] The other issue that was also raised by the appellant in his petition was the non-production of statement recorded from the appellant's brother, Nanthavelu a/l Subramaniam ('deceased'). The appellant stated that s. 114(g) Evidence Act 1950 should be invoked. As argued by learned DPP during the trial, the role of Nanthavelu was only to the fact that he could recognise the voice of the other assailant named Gopal. It was not the appellant that Nanthavelu identified. This court found that even if the statement was tendered, it will be of no assistance to the prosecution's case as this witness was not material to their case. This court found no merit in learned counsel's submission that the appellant had successfully put up a probable defence and that it had created a reasonable doubt in the prosecution's case.

[42] Lastly, as to the appeal by the Public Prosecutor on the inadequacy of the sentence passed by the learned Sessions Judge, this court found that even though the sentence imposed seemed to be inadequate, nevertheless it could not be said to be manifestly inadequate. The learned Sessions Judge had given her reasons in passing the sentence and this court found there was no compelling reason to disturb her findings on sentence.

[43] Having so found, this court dismissed the appellant's appeal against his conviction and the Public Prosecutor's appeal against sentence and affirmed the conviction and sentence passed by the learned Sessions Judge.